No. 15,107

United States Court of Appeals

For the Ninth Circuit

S. Birch & Sons, a corporation; C. F. Lytle, a corporation; and Green Construction Company, a corporation, partners doing business as Birch, Lytle & Green,

Appellants,

vs.

Robert L. Martin,

Appellee.

BRIEF FOR APPELLEE.

Bell, Sanders & Tallman,
Box 1599, Anchorage, Alaska,
Attorneys for Appellee.

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I.

JURISDICTION.

The appellees concur in the statement of pleadings and jurisdiction contained in the appellants' brief.

II.

STATEMENT OF THE CASE.

In slightly more than ten pages of the appellants' statement of the case, they appear unable to set forth the facts of the case herein. Of necessity, the following facts are therefore offered.

On August 14, 1952, between 6:00 and 6:30 P.M. (R 168, 260, 391) while proceeding home for their supper, the appellees herein, L. A. Martin and Robert Martin, father and son, were attacked and brutally beaten by a drunken mob, consisting of men employed by the appellants in the black-top surfacing of the Anchorage-Seward Highway.

The attack occurred approximately six (6) miles south of Anchorage, where the appellants' construction company had established a plant for the preparation of black-top paving material. The appellants were completing the last strip of paving which consisted of approximately one thousand (1000′) feet of highway at the plant, with the plant approximately in the middle of this one thousand-foot strip.

Traffic in the one thousand-foot (1000′) strip was restricted to one-way traffic with control exercised by appellants through the use of flagmen at each end. The flagman at the north end of the strip ordered the appellees to the left side of the highway and they proceeded south to a point abreast the mixing plant. (R 202, 203.) Their car was blocked at this point by another car which was driven out of the plant area by one of appellants' employees.

The attack started when one of appellants' men, admittedly under the influence of alcohol (R 393-394), approached the driver's side of appellees' car, stuck his head through the door and refused to leave. (R 113, 141, 169.) The appellee, Robert Martin, was pulled, or fell, out of the car in attempting to get the fellow who had approached the car away from the

door. (R 142.) Just as this happened, the mob broke and poured across the road from the plant (R 143), and the younger Martin went down under a gang of four or five attackers. (R 143.) From the testimony, it appears that there were from eight to ten of the defendants' employees who joined in the attack against the appellees. (R 148.)

The mob first attacked the younger of the two Martins and the elder Martin, who had already observed that the gang was drunk (R 141), became alarmed, thinking that they were going to kill his son. (R 144.) The elder Martin headed for the car trunk to get a lug wrench to use as a weapon, but before he was able to do so the gang fell upon him. In this attack upon the elder Martin, a blow on the back of the head with a rock and a kick in his face rendered him unconscious (R 116), and he was left lying on the ground with his dentures broken to bits and with blood streaming from his mouth. (R 327.)

The younger Martin, Robert, was brutally and violently beaten by the drunken mob, but when he finally got up and saw his father lying unconscious on the ground, he jumped astraddle of his father and pulled his father's head upward to protect the head of the unconscious man from the kicks of two of the gang that were still kicking the elder Martin. (R 171, 174.)

The attack finally subsided and the younger Martin succeeded in getting his unconscious father into the car. Sometime thereafter the elder Martin regained consciousness. Shortly after getting his father into the car, the younger Martin was ordered to pull off of

the road on to the plant area and he was prevented from driving off by the gang that surrounded the car. (R 208.) The appellees were forced to remain in the area for approximately thirty (30) minutes. (R 222.) They were finally allowed to leave after the arrival of the Territorial Police. (R 239.)

The injuries received by the appellees at the hands of the drunken mob were described by the doctor who examined them. With reference to the younger Martin, the doctor stated (R 184) "both of his eyes had been blackened and were swollen almost shut. There was a laceration or cut above the left eye and there—both his eyes had hemorrhages into the concentric . . .".

The doctor also said that Robert Martin had certain upper teeth kicked out and certain lower ones loosened in their sockets and the doctor explained other injuries to this particular individual as follows (R 184):

> "His zygomatic process was contused and probably fractured on the right side and also some abrasions on his chest and back, and also his teeth were knocked out. Also, in addition to this, because of the outward appearance of having received a terriffic beating, that the man received a cerebral contusion of undetermined severity."

It should also be noted that although the appellants have attempted to infer that the appellee Robert Martin had lost only two teeth and had others loosened, that this 28-year-old appellee lost his entire upper set of teeth as a result of the beating at the hands of the appellants' employees. (R 241.)

The elder Martin had both his upper and lower dentures broken with his lips and the inside of his mouth cut from the broken teeth. He had a big knot and cut on the back of his head and his face was bruised and sore. (R 124, 192.) In reference to the elder Martin, the doctor who had examined him after the beating, stated:

> ". . . It was my impression at the time that this case was that of a severe cerebral concussion, which was manifested by the evidence of contusions in the occipital regions and physical complaints of dizziness and headaches by the patient; secondly, there were some contusions of the lower jaw on the right side; third, there were some lacerations of the upper and lower lips and, fourth, there were some lacerations inside the mouth caused by the shattering of the artificial dentures at this time—rather at that time . . ." (R 193.)

This same doctor also indicated that the injury was sufficient to cause brain damage which might manifest itself in headaches, dizzy spells, and possible permanent changes. (R 193.) Evidence of such damage was introduced during the trial. (R 128, 129, 268.)

It should be borne in mind that all of the violence of this attack took place at or near the Martin car with the mob coming from the mixing plant up to the appellees. The appellants had alleged that the appellees had been the aggressive parties herein. (R 16.) There was, of course, very little evidence that would point to aggressiveness on the part of the appellees,

and in view of the number of appellants' men at the plant, aggressiveness on the part of appellees seems unlikely. The general superintendent testified that there were twenty-five or thirty men in the area. (R 351.) Apparently the jury did not find appellees the aggressors since an instruction on this point was given. (No. 15.)

At the time of the attack upon the appellees, an alcoholic party was in full swing at the plant. The arrangements for the alcohol were made by the general superintendent of defendants, Ross McDonald (R 318), although the paving superintendent of the defendants, Raymond E. Wise, picked up the beer and whiskey at the tavern and delivered it to the plant. (R 86.) There appeared to be some question as to the amount of alcohol furnished although Mr. Wise did admit that he had furnished four cases of beer and three quarts of whiskey. This same witness did, however, explain that the quarts of whiskey were "Fifths." (R 86.) There is also evidence that there was other alcohol in the area although the exact amount cannot be determined clearly. In any event, there was at least one more bottle of whiskey furnished by one of the defendants, Duane J. Weber. (R 382.)

The testimony would indicate that the alcoholic drinks were consumed rather rapidly since Mr. Wise had arrived back at the plant area from his second trip to get beer and whiskey, and he stated that he had made the first trip about 6:00 o'clock. (R 98, 99.)

The appellants stated at page 11 of their brief that there were approximately seven men on the payroll

including the defendants R. E. Wise and Ross McDonald. This statement is contrary to the evidence.

There were fifty-one (51) timecards introduced into evidence and marked defendants' exhibit "B", which cards indicated the checkout time of each employee on the day of the attack. (R 322.) There were also four other timecards which had been introduced earlier as defendants exhibit "A" (R 323), and read to the jury. (R 251.) These cards were undoubtedly highly probative in determining the question of when the employer-employee relationship ceased. However, the appellants' have neglected to include either exhibit, consisting of the timecards, in the record which evidence showed that most, if not all, of the mob which attacked the appellees were on the appellants' payroll at the time of the attack.

The record does indicate, indirectly, the number of employees employed by appellants at the time of the attack upon the appellees. At page 354 of the record, the questioning of the general superintendent inferred that there were twenty (20) employees still on the payroll up to 6:00 that evening. Although the testimony of the witness did not clear the matter up, the number, namely 20, was not denied. A few moments earlier, while that same witness was being cross-examined, he was asked whether or not there were at least eleven (11) men still on the payroll at 6:30 that evening. The witness avoided answering the question and, again referring to the timecards, stated:

> "A. Well, I will have to go through them again."

Then, Mr. Hughes, the attorney for the appellants, in objecting to this line of questioning, stated in part:

> "Your Honor, I think it is time consuming and the evidence speaks for itself. They can be counted by the jury at any time." (R 353.)

Another incorrect statement of fact, occurs in the appellants' brief at page eleven (11), wherein the appellants state:

> "So far as can be gleaned from the record, only those employees who were actually off shift and certain Alaska Road Commission employees indulged in the privilege of having a drink."

This is clearly incorrect from the testimony of the appellants' witnesses. Mr. Vaughn Manor, appellants' paving foreman, by his own testimony, was on the payroll until 8:00 o'clock that evening, which was long after the attack herein. (R 253.) Mr. Manor admitted drinking. (R 254.)

Ross McDonald, appellants' general superintendent, who was definitely still on the payroll, stated at page 345 of the record:

> "A. I don't drink beer. I probably had maybe three or four drinks of whiskey."

Although Mr. McDonald admitted to having three or four drinks of whiskey, the jury may have inferred that he had more for the reason that he was charged with using rather rough language toward the appellees at the time of the attack. (R 119.) Such language would hardly be in keeping with the usual character of a general superintendent on such a large project, if sober.

Following the attack, the younger Martin called for the Territorial Police and for an ambulance on the car's radio-telephone. (R 175, 208.) The ambulance apparently never did arrive, or, at least, the record does not show what happened to the ambulance. The Territorial Police did, however, eventually arrive and upon arrival of the police the appellees were released by the gang. (R 239, 172.)

After leaving the plant area, the appellees proceeded home and from their home they proceeded to the home of Mrs. Nancy Underwood, a friend of the family. Mrs. Underwood treated the injuries of appellees (R 165) and checked on the senior Mr. Martin for approximately five (5) days, during which time he was in a state of semi-consciousness. (R 166.)

Suit was subsequently filed and after five days of trial and the introduction of extensive testimony, the jury returned a verdict for Robert L. Martin in the total sum of $10,000.00 consisting of $7,500.00 as pensatory damages and $2,500.00 as punitive damages; and a total verdict of $9,000.00 for L. A. Martin consisting of $7,000.00 as actual or compensatory damages, and $2,000.00 as punitive damages. (R 418-419.)

After various motions had been heard, the Court ordered a remittitur in the case of L. A. Martin in the sum of $2,500.00.

Following the entering of judgments, the appellants appealed. A cross-appeal was then filed on the question of a remittitur in the L. A. Martin case.

III.

ARGUMENT.

A. SUFFICIENCY OF THE EVIDENCE.

The appellants have argued the insufficiency of the evidence under Sections A and B of their argument. However, such an argument does not appear to be well taken in view of the fact that the appellants have omitted from the record some of the most probative evidence introduced in the trial. This evidence consisted of the defendant's exhibit "A", comprised of four timecards of the employees of the appellants, (R 251) and the defendant's exhibit "B" consisting of fifty-one (51) timecards of the appellants' employees. (R 322.)

Where material evidence is excluded from the record, the reviewing Court cannot consider questions involving the sufficiency of the evidence. This rule is clearly stated in *3 Barron and Holtzoff, Federal Practice and Procedure,* at page 406-407:

> "Matters not appearing in the record will not be considered by the court of appeals, unless the occurrence thereof is conceded by the parties. Thus a question involving evidence not in the record cannot be reviewed on appeal . . ."

For cases supporting this statement see: *Petitions of Rudder,* 159 F. 2d 695, which held that material printed in the appendices of the appellants' brief which had not been incorporated into the record on appeal would not be considered by the Court of Appeals; *Pacific Overseas Airlines Corp. v. Civil Aeronautics Bd., et al.,* 161 F. 2d 633, which held that in-

formation in the form of an affidavit which had not been presented to the board and was therefore not in the record could not be considered by the reviewing Court; also see *Drybrough v. Ware,* 111 F. 2d 548, where the Court stated at page 550 in reference to Rule 75 (G):

> "Under these rules, it devolves upon appellant to see that the record is brought to the court with such of the proceedings of the trial court as may be necessary for the proper presentation of the points on which he intends to rely. (Rule 75 (D)), and for lack of such record the court has the power to dismiss the appeal."

This same Court cited *Hill v. Railroad Company,* 129 U.S. 170, in support of this part of its opinion.

Since appellants' failure to include the timecard exhibits has excluded evidence which would show the employer-employee relationship and thus be unfavorable to the appellants' theory, the case of *Coppinger et al. v. Republic Natural Gas Co.,* 171 Fed. 2d 4, is very much in point. The Court in this case stated at page five of the opinion:

> "(1) Since the partnership has brought on the record only the evidence introduced in its behalf, we must accept as correct the statement of the trial court respecting the facts established by Republic's evidence. Indeed, there is respectable authority holding that a ruling on a motion for a directed verdict, or other like motion, is not reviewable unless the record contains all or substantially all the evidence on which the ruling is based."

This same Court supported the last statement concerning the ruling on motion for directed verdict with the following authority:

> "Board of Com'r of Lake County v. Sutliff, 8 Cir., 97 F. 270, 275; Taylor Craig Corp. v. Hage, 8 Cir., 69 F. 581."

The above cited authorities have dealt with the scope of review in the Federal Courts and have been cited because the jurisdiction involved herein is subject to the Federal Rules of Civil Procedure. However, the Federal cases do not differ greatly from the general rule followed in all Courts which is set forth in 4 *C.J.S.* 1679, Sec. 1172 (C), and which is supported by cases too numerous to list:

> "The sufficiency of evidence will not be reviewed on appeal where exhibits and documents in evidence are omitted from the record except where such evidence appears to be immaterial."

The omitted timecards here can hardly be said to be immaterial in view of the importance that appellants are placing on the employer-employee relationship and of their allegation that the relationship did not exist at the time of the acts complained of in appellees' complaint. (Appellants' Brief 32, 36, 46.)

B. EMPLOYER-EMPLOYEE RELATIONSHIP.

(1) Errors in Appellants' Brief on Employer-Employee Relationship.

Throughout appellants' brief an attempt has been made to show that no employer-employee relationship

existed between the appellants and their employees at the time of the attack upon the appellees. In at least two (2) places they have categorically stated that the employer-employee relationship did not exist. (Brief 32, 36, 46.) The record will not support this position.

The appellants' conclusion as to the employer-employee status is premised on at least two faulty assumptions. The first assumption is that the attack upon the appellees occurred at or near 7:00 o'clock P. M. (Appellants' Brief 24.) From the testimony that was introduced to the jury, it could readily have been found that the attack occurred some time between 6:00 and 6:30 P. M. Robert L. Martin testified when asked concerning the time that he arrived at the place where the defendants were hardtopping the road as follows:

> "A. Well, as near as I could place it, I have been able to place it in my own mind, it would be between 6:00 and 6:30; that's as near as I can pin it down." (R 168.)

Then one of the appellants' own witnesses testified as follows:

> "Q. Will you please state what you saw, commencing with—maybe I better lay one more foundation question. What time of day was it, sir, that you witnessed this incident?
>
> A. Well, it was approximately around 6:00, 6:30, somewhere along in there.
>
> Q. You state that you got off of work at 7:30 by your timecard. Now, how long prior to your getting off work would you say this incident occurred?

A. Oh, in the neighborhood of—must have been an hour, something like that." (R 260.)

Other evidence as to the time of the attack herein could be deduced from the testimony of one of the named defendants, namely Duane J. Weber, who, incidently, was one of the defendants against whom a verdict was returned under the name of Bud Weber. (R 418, 419.)

In reference to the evening of the attack upon the appellees, at page 385 of the record, this particular defendant testified that "I do know that I did get home at 7:15." This statement was supported by the witness' testimony later. (R 391.) Then at page 402 of the record, the same witness testified that it took him probably twenty-five (25) minutes to get home. Thus it can be seen that the attack was definitely over at sometime before 7:00 o'clock. This particular evidence, of course, does not show how much earlier than 7:00 o'clock the attack occurred, since there is little evidence in the record to show how long Weber waited around the plant after the attack upon the appellees, but it does appear that a large crowd did surround the appellees' car (R 176, 210), and they were held virtually captives in the area by this large group of men for approximately thirty (30) minutes. (R. 222.)

The second fallacy in the appellants' faulty assumption is that there was no one on the payroll at the time of the attack. As shown by the discussion concerning the timecards, there were twenty (20) men

still working for appellants at 6:00 o'clock (R 354), and at least eleven (11) still working at 6:30. (R 353.) Since the testimony indicated that there were eight (8) to ten (10) men in the attack against the appellees (R 148), four or five of whom were on the appellee R. L. Martin at one time (R 143), the jury could easily have found that everyone of the men who attacked the appellees were on the payroll of appellants at the time of the attack.

There is also authority for the proposition that the employer-employee relationship does not cease at the very moment that an employee checks out. In 35 *Am. Jur.,* 599, Sec. 169, Master and Servant, it is stated:

> "The authorities have uniformly held that the relation of employer and employee is not interrupted by the end of actual working hours, but continues so long as the employee is on the employer's premises, engaged in the actual or incidental duties of his employment, or subject to the employer's control. Nor is any distinction to be drawn on the score that the victim was paid at a specified rate per hour.

This statement is well supported with case citations, one of which is herewith cited, as follows: *Willmarth v. Cardoza,* 176 F. 1. A collection of cases in support of this proposition are in the opinion of the last cited case, at page 2.

(2) Appellants Are Liable Under Agency-Tort Doctrines.

Although the jury may have found the appellants liable on the theory of having created a dangerous

condition in a public place and then violated a duty toward appellees who were lawfully in the area, there appears to be little doubt but that the appellants are liable under the agency-tort doctrines of the majority of cases.

In 12 NACCA Law Journal at pages 31 to 46, Professor Ben F. Small of Indiana University School of law has compiled an exhaustive collection of cases imposing liability upon the employer for intentional torts by the employees. Professor Small's article is on the Effect of Workmen's Compensation on Tort Concepts and Professor Small indicates that the trend is toward a workmen's compensation-like treatment of the agency-tort cases. Professor Small discusses cases involving several categories of the scope of employment problem, although all involve altercations between employees and outsiders. Since the case at bar involves an attack by paving workers upon third parties, the appellants argued that this is a case of the tort-feasors acting outside of the scope of their employment. This argument is invalid for the reason that the very nature of the work caused ill feeling toward the public.

Professor Small discusses this type of case under subheadings "Unusual or Remote Employment Provocations" and "Provocations Largely Personal or Extraneous". This case should probably fall under the first heading since construction workers normally wouldn't be expected to attack outsiders. However, an examination of the facts will show that the attack did occur at the place of employment and at least was in-

directly influenced by the ill feeling of the paving workers toward the public generally. (R 119.) In this regard, it should be noted that the paving workers worked in an area, under the control of their employer, where they do come in contact with the public and must, of course, put up with the traffic on the highway while paving is being laid. The direct control over the public is usually exercised by the use of flagmen at each end of the controlled areas, and such control was exercised in this case. (R 137.) Under such a set of facts, it thus appears that the employer-employee relationship in the case at bar did have more effect on the tort causation than merely the furnishing of an opportunity for violence.

In the case at bar, the personal motivation of the gang that attacked the appellees consisting of the ill feeling toward the public generally was normally repressed and the feeling apparently was acquired over a period of years. Then, when the gang became drunk the repressions were forgotten and the brutal attack upon the appellees occurred. The misconduct, therefore, was directly within the scope of the employment herein, and this conclusion can be reached even disregarding the fact that the drunken condition of the mob was created by appellants.

The situation is somewhat analogous to that of *Novick v. Gouldsberry,* 173 F. 2d 496, wherein this Court held that a bartender was acting within the scope of his employment when he committed an assault upon a patron. This Court stated at page 501 of the opinion:

> "An employment of this character is—in the language of the Restatement—'one which is likely to bring the servant into conflict with others. . . .' "

It is true that in the *Novick* case the Court was referring to employment as a bartender in a bar, but the rule could be well applied to employment such as paving a public highway where the paving workers are harassed during all stages of the paving by the movement of vehicles back and forth in the area in which they are working. The record in the case at bar shows that the area of the highway being paved was under the control of the appellants through the use of flagmen who controlled the traffic and allowed one-way flow of traffic. The movement of this traffic could not help but conflict with the operations of the paving workers and at times strain their tempers. The employment is certainly "one which is likely to bring the servant into conflict with others".

The attitude toward the public was clearly in evidence at the time of the attack on the appellees with the feeling of the gang clearly shown by the testimony of L. A. Martin as to what was said to the appellees after the attack (R 119):

> "A. They were all around the car and just who said that, I don't know; and then some fellow spoke up and said, 'you S.B.'s have given us trouble for the last four or five years; now, you're going to take it off of us.' I asked someone—I glanced up and asked someone who it was and he said, 'That's McDonald, the superintendent, if

> you want to know', and that's about the only words I can recall hearing and he was just in front of the right fender of the car."

This witness also indicated that the term "S.B." actually represented the word that was used by the general superintendent. (R 119, 120.)

Even in the cases where the intentional aggression of the employee is largely personal, Professor Small has indicated that the trend is toward holding the employer liable. He states in the article cited (12 NACCA Law Journal 39-40):

> "In the evolution of tort doctrine in all these cases, the proposition has been consistently advanced that one who acts for personal reasons acts outside his employment. As has already been noted, this served for years as the cover under which courts could deny recovery against the master in most cases of assault by a servant. Then with the liberalizing trends of the past two decades, courts began to reexamine their previous stands on matters considered personal. They began to weigh the personal aspects against the employment aspects and if the employment seemed to have occasioned the outbreak initially, then the 'lesser' personal motivations were disregarded. This trend has been observed not only in the cases of primary employment provocation, but even in those of unusual or remote employment provocation. It should be noted again that in both those cases, the 'yes' cases outnumber the 'no' cases. It now seems safe to assert that in both those fields, the cover of 'personal' motivation has been largely lost."

The trend indicated by Professor Small is evidenced in the six cases that he has discussed, which are set out below:

The first case for consideration in this respect is *Munick v. City of Durham,* 106 S.E. 665. In this case the lower Court nonsuited the plaintiff on the ground that an assault by the superintendent of the local waterworks against the plaintiff was not within the scope of the superintendent's employment. Even though the attack was motivated solely by anti-Jewish feelings of the superintendent toward the plaintiff, the Appellate Court reversed the lower Court. The language of the Court, at page 668 of the opinion, appears to be some of the strongest yet encountered with respect to the matter of holding the employer liable:

> "This court has often held the master liable, even if the agent was willful, provided it was committed in the course of his employment. Jackson v. Tel. Co., 139 N. C. 347, 51 S.E. 1015, 70 L. R. A. 738.
>
> (4) Indeed, the doctrine goes further, and the principal is liable if one coming on the premises in connection with business dealings, or by invitation, is assaulted by one of its agents. This is settled by the leading case of Daniel v. Railroad, 117 N. C. 592, 23 S. E. 327, 4 L.R.A. (N.S.) 485, and the numerous citations to the case in the Annotated Edition. . . ."

The second case discussed is *Lehnen v. E. J. Hines & Co.,* 127 Pac. 612. This case involved the ejection from a hotel room and jailing of the plaintiff by a hotel clerk, who was under the influence of alcohol.

The action by the clerk was unjustified and apparently unauthorized. However, the Appellate Court stated with respect to this action, at page 615 of the opinion:

> "When he entered the room and undertook to eject appellee, he was acting for the proprietors and within the apparent scope of his authority. To make the appellants responsible for Atwood's actions, it is not necessary that they should have expressly authorized him to do the particular acts of which complaint is made. It is enough that they intrusted him with authority to manage the business in which he was engaged when the wrong was committed. They cannot be excused from liability because Atwood, while conducting the business, abused his authority, or even disobeyed the express directions which they had given him. . . ."

The third case in this group is *Stansell v. Safeway Stores,* 113 P. 2d 264. A brief resumé of the case and analysis is capably set forth by Professor Small in 12 NACCA Law Journal 43, as follows:

> "Another example is found in the behavior of a Safeway Stores' manager in California. He refused to sell groceries to a fourteen-year-old girl when he couldn't find the family's county relief order. There was some discussion and the manager artlessly informed the girl that her mother was 'a lying damned bitch.' The fourteen-year-old miss took the information in stride and replied with the deduction: 'If my mother is a damned bitch you are a bastard.' Then, terrified with her own logic, she ran, the manager in hot pursuit.

> He caught her some sixty or seventy feet away and got his revenge by variously knocking her down and kicking her. The court did admit that there was an element of personal animosity involved, but said that it was entirely incidental to the obvious purpose of the manager to protect the interests of the store, to complete the transaction and to get rid of the girl."

The other three cases in this group consist of *Gomez v. Great Atl. & Pac. Tea Co.,* 172 S.E. 750, wherein a grocery store manager assaulted a boy who had refused to carry a sack of flour to an automobile outside. The Appellate Court reversed the lower Court which had sustained a demurrer and the Appellate Court held that there was sufficient evidence of scope of employment to warrant sending the case to a jury; the fifth case is *Novick v. Goldsberry,* 173 F. 2d 496, discussed supra; then the sixth case is *Cressy v. Republic Creosoting Co.,* 122 N.W. 484, which involved personal animosity between an employee of the defendant and the plaintiff who was a city inspector. The two men were thrown together due to the type of work in which they were involved, but it seems that the assault was strictly occasioned by the personal feelings of the individuals. This case, which, incidently, is a fairly old case (1909), appears to stand for the proposition that merely furnishing the opportunity for violence puts the employee's assault within the scope of the employment.

In all of these previously cited cases, the assaults were largely motivated by personal feelings of the

employee who had assaulted the plaintiff. Nevertheless, the Courts in all these cases held the assault to have been committed within the scope of employment. The facts in the case at bar should be much more compelling toward such a finding than the facts in any of the six cited cases.

There are many cases involving the attacks of employees upon outsiders, with such attacks not readily foreseeable. However, the Courts have found the acts to be within the scope of the employment involved and have allowed recovery. It would serve little purpose to list all the cases here, but see 12 NACCA Law Journal, 35-39.

C. EXISTENCE OF A RIOT.

The appellants have stated that there was insufficient evidence to establish a riot. However, the substance of their contention appears to be that there weren't enough attackers, namely three, to fall within the definition of our riot statute. This contention is contrary to the evidence.

The testimony showed that there were from eight to ten men who attacked the appellees (R 114, 148) and that there were at least fifteen men who surrounded the car and held the appellees captives. (R 210.) There is also testimony that there were four or five of the attackers on the younger Martin at one time. (R 143, 146.) In fact, the record does not indicate that there were ever less than three attackers

involved in the attack upon the appellees at any time, although the names of all of the individuals were not known to the appellees.

The appellants indicate, at page 39 of their brief, that Bud Weber was the only individual person charged with responsibility in the Robert Martin case. They infer from this that there weren't three or more involved, but the testimony indicates that their inference is false and that there were actually eight or ten men involved. The names, of course, were not all known to the appellees, but it was admitted by the paving superintendent of the appellants, that all of the men in the area with the exception of the two Martins were employees of the contractor, the appellants herein. (R 93-94.)

The appellants refer to the law with respect to the criminal aspects of riot. This case, of course, is not concerned with the criminal law and, it is submitted, that there are certain protections afforded under criminal law that do not apply in civil cases. Regardless of the last stated proposition, the fact remains that there were more than three people involved in the attack upon the appellees, as indicated above.

It should also be borne in mind that there were actually three of the defendants' men who were individually named defendants who had taken part in the attack against the appellees. These were Joe Sipes, J. P. Bell, and Bud Weber. Joe Sipes was not held liable by the jury, even though evidence would show that he was involved in the attack, for the reason that service had not been made upon him (R 43, No. 15108),

but a verdict was returned against the other two. (R 419.) Thus, there is no question but that there were three or more men involved in the attack upon the appellees. The actual number, of course, was eight or ten as indicated above.

It should also be noted that Instruction No. 16 would only tend to hold individuals liable and could not possibly be construed to hold the appellants herein. Since the individuals, namely Bud Weber and J. P. Bell, did not see fit to appeal from the judgments against them, it seems extremely difficult for the appellants to argue this as an error.

The only objection to the giving of Instruction No. 16 was as follows:

> "Mr. Hughes. We except to Instruction No. 16 on two grounds, that there is insufficient evidence to give an instruction on riot under the facts and the instruction fails to indicate that the mere presence of a person does not constitute involvement." (R 415.)

Then, because of this objection, the Court added a clause to Instruction No. 16 concerning the presence of a person. (R 415.) This, then, left the only objection to Instruction No. 16 being as to the sufficiency of the evidence to give an instruction on riot. As pointed out above, there was sufficient evidence.

It should also be noted that the appellants had requested an instruction on riot, which was headed "Requested Instruction No. 8." (R 25-26, No. 15107.) The first paragraph of the requested instruction properly

stated the law, but the second paragraph was in direct conflict with the evidence submitted. This instruction was properly refused except as covered by instructions given.

D. APPELLANTS ARE LIABLE TO APPELLEES FOR THE CREATION OF A DANGEROUS CONDITION.

The appellants have contended that the giving of Instruction No. 14 was erroneous for the reason that it added another theory of recovery for the appellees and that it was not supported by the proof. It is true that this would cover another theory, other than that of the intentional tort by appellants' employees. However, contrary to the appellants' statement, the proof does support this theory.

The place where the assault occurred was on a public highway which was in the process of being paved by the appellants. The appellants have never denied having custody and control of the area where the appellees were attacked, and the following testimony was given by the general superintendent of the appellants with respect to the control of the area (R 366):

> "Q. You had a written contract on that work, didn't you?
>
> A. Oh, yes.
>
> Q. Now, didn't that written contract give you the right to control traffic and require you to use 2 flagmen on the controlled portions?
>
> A. And the pilot car if necessary, that is right.
>
> Q. That was in the contract, was it not?
>
> A. That is right. It was left to our discretion as to whether we should use the pilot.

Q. But you did have to use flagmen and you did have the right to take over that portion of the road and control it during that time?

A. And maintain it."

The appellants' inference that they did not owe a duty toward the members of the public who might lawfully be in the restricted area of the roadway is incredible and such a proposition would require a complete revision of our tort concepts. They were not, of course, insurers which was the only objection taken to this instruction. (R 414-415.) If the appellants had used care to protect those persons lawfully coming upon the premises, then there would be no liability based upon this particular theory. Whether or not the appellants used care to prevent injury to the appellees is a question for the jury and the appellees contend that the record is replete with evidence showing the violation of the duty toward the appellees and the public generally.

The first point to consider is the furnishing of the alcoholic drinks to appellants' men, which resulted in the drunken condition of the employees at the time of the attack upon the appellees. The amount of alcoholic drinks furnished should also be observed, namely four cases of beer and three fifths of whiskey. This was the testimony of the paving superintendent of the appellants who transported the alcoholic drinks from the tavern to the plant. (R 86.)

It is conceded by the appellees that the furnishing of alcoholic drinks for employees would not be breaching a duty toward the public under some circumstances

such as in a private place where the intoxicated condition of the employee would not endanger either himself or the public. However, the propriety of getting employees drunk, in a public place where they are likely to come in contact with other members of the public, appears questionable, to say the least.

The next point to consider is that in the case at bar there might even be graver doubts raised as to the propriety of getting appellants' employees drunk for the reason that these particular men were construction workers, who might be inclined toward being more unrepressed than other individuals, when drunk.

In this last respect, it should be noted that the appellants are a large construction firm and should have been thoroughly familiar with the general characteristics of construction workers. When appellants got their paving gang drunk through the furnishing of alcoholic drinks by the general superintendent and the paving superintendent, they created a condition in the area of the plant and the nearby highway which was a danger to the public, and appellants knew, or should have known, that a gang of drunken men is a dangerous condition.

Another point to consider is that the appellants not only allowed the drunken condition of their men, but actually created the condition by affirmative acts of appellants' superintendents in buying and furnishing the alcohol. Under such a set of facts, it would not even be necessary to find an employer-employee relationship existing at the time of the attack. The appellants should be liable if they had proceeded to get a

gang of strangers drunk on the public area under their control, if such a gang could reasonably be expected to injure any of the public lawfully in the area.

E. PUNITIVE DAMAGES.

The appellants have discussed the question of excessive damages, including the subject of punitive damages. However, since the cross-appeal has covered the subject of excessive damages, this section covers the question of punitive damages only.

A definition of punitive damages is aptly stated in 15 *Am. Jur.* pages 698-699, Sec. 265:

> "Exemplary or punitive damages are generally defined or described as damages which are given in enhancement merely of the ordinary damages on account of the wanton, reckless, malicious, or oppressive character of the acts complained of. Such damages go beyond the actual damages suffered in the case; they are allowed as a punishment of the defendant and as a deterrent to others. The terms 'exemplary,' 'punitive,' and 'vindictive' damages are used interchangeably. Such damages are also sometimes called 'smart money,' and they have been otherwise variously designated as 'speculative,' 'imaginary,' 'presumptive,' or 'added' damages."

Actual damages are necessary before punitive damages can be awarded, although the amount may not be large, as indicated in 15 *Am. Jur.* 707:

> "The amount of actual damages necessary as a predicate to an award of exemplary damages may

> be small. While punitive damages must bear some relation to the injury inflicted and the cause thereof, they need not bear any relation to the damages allowed by way of compensation."

For support of this last proposition, see: *International Harvester Company v. Iowa Hardware Company,* 122 N.W. 951, 33 A.L.R. 398, 81 A.L.R. 916; *Louisville and N. R. Company v. Ritchel,* 147 S.W. 411.

Actual malice, in the lay sense, is not necessary for an award of punitive damages. For a definition of word "malice" see *Gilham v. Devereaux,* 214 Pac. 606, at page 607, as follows:

> "This court in Moelleur v. Moelleur, 55 Montana 30, 173 Pac. 419, held that the term 'malice' as employed in the above section did not necessarily mean that which must proceed from a spiteful or revengeful disposition, but a conduct injurious to another, and that malice in law would be implied from unjustifiable conduct which caused the injury complained of . . ."

For other cases holding that a wrongful act done intentionally or without just cause or excuse constitutes malice see: *Hicks Brothers v. Swift Creek Mill Company,* 31 S. 947; *Childers v. San Jose Mercury Printing and Publishing Company,* 38 Pac. 903; *Anderson v. International Harvester Company,* 116 N.W. 101; *Lampert v. Judge and D Drug Company,* 141 S.W. 1095.

For another good statement of the meaning of malice see *Willis v. Miller,* 29 Fed. 238, as indicated

in the following headnote, which was almost verbatim one of the instructions given to the jury in the cited case:

> "Malice in law is not necessarily personal hate or ill will of the trespasser towards the person injured, but it is that state of mind which is reckless of law and of the legal rights of the citizen; and the object of exemplary damages or 'smart money' is not only to indemnify the sufferer for any loss sustained, but to prevent similar actions on the part of the trespasser in the future."

For another definition of the purpose of punitive damages see *Malone v. Montgomery Ward, Inc.,* 38 Fed. Supp. 369 which held:

> " 'Punitive damages' are assessed by way of punishment against the defendant for unlawful, malicious, wanton and reckless acts, and such damages are allowed by reason of undertaking to correct defendant's conduct in future and to prevent such conduct from recurring in future."

Another definition is found in *Kerigan v. Massachusetts Bonding and Insurance Company,* 74 Fed. Supp. 820 as follows:

> "The purpose of punitive damages is to inflict punishment as an example and a deterrent to similar conduct."

A recent case (1954) concerning punitive damages is *Sandifer Oil Company v. Dew,* 71 S. (2d) 752. In this case the defendants' employee was pumping gasoline out of a tank truck into a service station underground tank. The employee negligently left the truck

pumping the gasoline and the underground tank overflowed. The deceased, a fourteen-year-old girl, was passing by and the gasoline which had overflowed exploded, fatally burning her. The jury awarded the girl's family $85,000.00 which sum was in addition to an award of $5,000.00 on a nonsuit from the owner of the service station. The Supreme Court of Mississippi affirmed the judgment and held, as stated in 14 NACCA Law Journal pages 310-311:

> "(1) Plaintiffs were entitled to recover for the pain and suffering endured by deceased, for the loss of the society and companionship of deceased, *and for punitive damages,* (emphasis supplied).
>
> (2) As the jury are the sole judges of the amount which ought properly to be assessed in order to inflict adequate punishment, the Courts should scrupulously avoid any undue interference with their prerogative. This is the rule everywhere, and is accepted as a sound principle by the most noted text writers.
>
> (3) Throughout the length and breath of this state similar transport trucks are daily traveling our highways and making deliveries of gasoline. Those who handle such dangerous agencies should be made to know the standard of care which is required of them."

Another case involving punitive damages is *Morrow v. Evans,* 75 S.E. (2d) 598 (1953). In this case the defendant's truck driver drove over a narrow bridge at 45 to 50 miles per hour. The truck crashed into the side of decedent's car, which was on the bridge and

the decedent died a few hours later. The decedent had no family other than his parents who were not dependent upon him and an administrator's suit was brought. The jury returned a verdict of only $5,000.00 for actual damages, but awarded $15,000.00 for punitive damages. The Supreme Court of South Carolina affirmed the judgment holding that the evidence of the driver's negligence, recklessness, and willfulness justified the submission of the question of punitive damages to the jury. The Court stated at page 601 in the opinion:

> "It may be conceded that in the view of this Court it is excessive in the sense that it is unduly liberal but that is an insufficient ground for reversal on appeal."

In the case at bar, the jury did find substantial general damages against the appellants and, in view of the above, such a finding was sufficient to support the punitive damages that were rendered in this case. Since the appellants were clearly responsible for the creation of the drunken condition of the paving gang, the jury undoubtedly felt that punitive damages should be given as a deterrent to this type of action. Even the Court apparently felt that the punitive damages should be allowed to stand since the remittitur which was ordered in one of the cases was not on the punitive, but on the compensatory award.

The appellants cite authority for the proposition that the principal is not liable in punitive damages for the unknown acts of his agents. Such a proposition is not only incorrect in the first place, but would not

be applicable to the case at bar, if correct. Almost all of the above cited cases involved torts by employees and the employer would certainly have no knowledge of such torts until after commission. And certainly, where the tort is a plain and simple question of negligence, the employer would not ratify such action. However, the Courts do see fit to hold the principal because of the deterring effects of the imposition of such liability.

In the case at bar, the torts were known to the general superintendent, the paving superintendent, and the paving foreman at the time such torts were committed, and the appellants' officials did nothing whatsoever to prevent such action. The officials apparently tacitly approved of the attack upon the appellees. We can even go further here and find the dereliction of the duty directly resting upon the appellants for the reason that the appellants created the drunken condition of the men which constituted the hazard resulting in the injuries to the appellees.

The jury must have found that the defendants' corporation authorized, participated in or ratified the acts of the attackers since the jury was clearly instructed on this point in Instruction No. 10. The Instruction is quoted in full herewith (R 31):

> "Each of the plaintiffs demands punitive damages against the defendant corporations as well as against the other defendants. To justify a verdict for punitive damages against the defendant corporations it must be shown by a preponderance of the evidence that the defendant corporations authorized, participated in or ratified the

acts of the employee committing the injury and that the acts of the employee must have been within the range of the apprehensibility of the employer."

In view of the appellants' gross neglect of duty to keep the area safe for the public, and of their tacit approval, through superintendents, of the attack upon appellees, and of their vicious and brutal attack, through employees, the only reasonable conclusion to reach on punitive damages herein is that the award was too small.

F. INTEREST ON THE JUDGMENTS WAS PROPERLY SET BY THE COURT.

The appellants have urged as error the question concerning the setting of the date on which interest was to run on the judgments. The interest in dispute covers a period of slightly less than three (3) months.

In 3 *Barron and Holtzoff Federal Practice and Procedure,* at page 221, it is stated:

"Interest on a judgment will be allowed from the date of entry and in an exceptional case has been allowed from the date when entry should have been made if there was excusable delay."

Apparently the lower Court in the case at bar felt that there was excusable delay and hence ruled that the interest should run from a period of time ten (10) days after the return of the verdicts by the jury. The Court may have felt that the appellants were un-

reasonably delaying the entering of judgment, since in one of the cases nothing came of the various motions which were presented by the appellants. This was in the case of Robert L. Martin, which bears docket number in this Court No. 15,107.

In the other case, that of L. A. Martin bearing docket number No. 15,108, a remittitur in the sum of $2,500.00 was allowed. However, the delay herein was in no way caused by the appellees, and there is authority for the proposition that the plaintiff is entitled to interest on the judgment from the date of the verdict. In this regard see *Louisiana & Arkansas Ry. Co. v. Pratt,* 142 Fed. 2d 847, where it is stated in the opinion at page 849:

> "It has been held to be within the equity of Section 966 of the Revised Statutes to award interest from the date of the verdict where, without fault of the plaintiff, an appreciable time has elapsed between the rendition of the verdict and the entry of the judgment. Moreover, Rule 58 of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, provides that, unless the court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the clerk. Under said rule, the date of the verdict and the date when the judgment should have been entered are the same in this case. For these reasons, we conclude that plaintiff below was entitled to interest from the date judgment should have been entered as required by said Rule 58. . . ."

In support of the foregoing statement, the Court cited the following cases:

"National Bank of the Commonwealth v. Mechanics National Bank, 94 U.S. 437, 24 L.Ed. 176; Fowler v. Redfield, Fed. Cas. No. 5003; Griffith v. Baltimore & O. R. Co., C.C., 44 F. 574; Id., 159 U.S. 603, 16 S.Ct. 105, 40 L.Ed. 274; Leitch v. Chesapeake & Ohio R. Co., 97 W. Va. 498, 125 S.E. 370."

In any event, if the award of interest was erroneous, it was not such prejudicial error as to warrant a reversal.

CONCLUSION.

In conclusion the appellees submit that the appellants arguments on the insufficiency of the evidence have not been supported by the record, and even where evidence was introduced in support of the appellants' case that there was sufficient evidence to controvert it. The appellees further contend that it was the duty of the jury in these cases to resolve debatable questions of fact, and that in view of the instructions given and the verdicts of the jury, such questions of fact have been resolved.

The appellees further contend that all instructions given by the Court were supported by the evidence and that said instructions, taken as a whole, do not prejudice the appellants.

The judgment of the lower Court in number 15,107 should be affirmed, and the judgment of the lower Court in number 15,108 should be modified as re-

quested in cross-appellants' brief, and as modified, affirmed.

Dated, Anchorage, Alaska,
December 29, 1956.

BELL, SANDERS & TALLMAN,
By BAILEY E. BELL,
JAMES K. TALLMAN,
Attorneys for Appellee.
Robert L. Martin.